IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-1067 and 77-1271

SECRETARY OF COMMERCE OF THE UNITED STATES DEPARTMENT OF COMMERCE; U.S. DEPARTMENT OF COMMERCE; LOS ANGELES COUNTY, a body corporate and politic; LOS ANGELES COUNTY BOARD OF SUPERVISORS; LOS ANGELES COUNTY FLOOD CONTROL DISTRICT; LOS ANGELES COUNTY ENGINEER; FACILITIES DEPARTMENT OF LOS ANGELES COUNTY; CITY OF LOS ANGELES, a municipal corporation; LOS ANGELES CITY COUNCIL; DEPARTMENT OF RECREATION AND PARKS OF THE CITY OF LOS ANGELES; DEPARTMENT OF PUBLIC WORKS OF THE CITY OF LOS ANGELES,
Appellants,

vs.

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, a nonprofit corporation; ENGINEERING CONTRACTORS ASSOCIATION, a nonprofit corporation; AMERICAN SUBCONTRACTORS ASSOCIATION, a nonprofit corporation; LOS ANGELES COUNTY CHAPTER, NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., a nonprofit corporation; STEVE P. RADOS, INC., a corporation; GRIFFITH COMPANY, a corporation; GORDON H. BALL, INC., a corporation; STODDARD ENTERPRISES, a sole proprietorship; and GRANITE CONSTRUCTION COMPANY, a corporation,
Appellees and Cross-Appellants.

JUANITA KREPS, SECRETARY OF COMMERCE,
Appellant,

vs.

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, et al.,
Appellees and Cross-Appellants.

On Appeal from the United States District Court for the Central District of California

MOTION TO AFFIRM

Of Counsel:
SANDRA R. JOHNSON,
Pacific Legal Foundation,
455 Capitol Mall, Suite 465,
Sacramento, California 95814,
Telephone: (916) 444-0154,

LAWRENCE H. KAY,
301 Capitol Mall,
Sacramento, California 95814,
Telephone: (916) 444-6430.

RONALD A. ZUMBRUN,
JOHN H. FINDLEY,
Pacific Legal Foundation,
455 Capitol Mall, Suite 465,
Sacramento, California 95814,
Telephone: (916) 444-0154,
Attorneys for Appellees and Cross-Appellants.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105
A BOWNE COMPANY

Subject Index

Table of Authorities Cited

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-1067 and 77-1271

SECRETARY OF COMMERCE OF THE UNITED STATES DEPARTMENT OF COMMERCE; U.S. DEPARTMENT OF COMMERCE; LOS ANGELES COUNTY, a body corporate and politic; LOS ANGELES COUNTY BOARD OF SUPERVISORS; LOS ANGELES COUNTY FLOOD CONTROL DISTRICT; LOS ANGELES COUNTY ENGINEER; FACILITIES DEPARTMENT OF LOS ANGELES COUNTY; CITY OF LOS ANGELES, a municipal corporation; LOS ANGELES CITY COUNCIL; DEPARTMENT OF RECREATION AND PARKS OF THE CITY OF LOS ANGELES; DEPARTMENT OF PUBLIC WORKS OF THE CITY OF LOS ANGELES,
Appellants,

vs.

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, a nonprofit corporation; ENGINEERING CONTRACTORS ASSOCIATION, a nonprofit corporation; AMERICAN SUBCONTRACTORS ASSOCIATION, a nonprofit corporation; LOS ANGELES COUNTY CHAPTER, NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., a nonprofit corporation; STEVE P. RADOS, INC., a corporation; GRIFFITH COMPANY, a corporation; GORDON H. BALL, INC., a corporation; STODDARD ENTERPRISES, a sole proprietorship; and GRANITE CONSTRUCTION COMPANY, a corporation,
Appellees and Cross-Appellants.

JUANITA KREPS, SECRETARY OF COMMERCE,
Appellant,

vs.

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, et al.,
Appellees and Cross-Appellants.

On Appeal from the United States District Court for the Central District of California

MOTION TO AFFIRM

Pursuant to Paragraph 1(c) of Revised Rule 16 of this Court, Associated General Contractors of California, Engineering Contractors Association, American Subcontractors Association, Los Angeles County Chapter, National Electrical Contractors Association, Inc., Steve P. Rados, Inc., Griffith Company, Gordon H. Ball, Inc., Stoddard Enterprises, and Granite Construction Company, appellees and cross-appellants (hereinafter Contractors), move that the judgment of the district court be affirmed. The judgment is now reported at 441 F. Supp. 955 (C.D. Cal. 1977).

QUESTIONS PRESENTED

1. Both the Secretary of Commerce (federal appellant) and Los Angeles City and County and their various political entities (local appellants) have presented the question whether the district court erred when it determined that Section 103(f)(2) of the Public Works Employment Act of 1977 violated the equal protection guarantees of the Fifth Amendment to the United States Constitution. Federal appellant has further questioned the district court ruling insofar as it held Section 103(f)(2) inconsistent with Title VI of the Civil Rights Act of 1964.

2. Local appellants have additionally questioned whether the district court erred in holding that Contractors had standing to sue and need not exhaust their administrative remedies.

STATUTE INVOLVED

The provision of the statute involved in this appeal is Section 103(f)(2) of the Public Works Employment Act of 1977 (Pub. L. No. 95-28). Section 103 (f)(2) amends Section 106 of the Local Public Works Capital Development and Investment Act of 1976 (42 U.S.C. § 6705) and provides:

> "(2) Except to the extent that the Secretary determines otherwise, no grant shall be made under this Chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."

STATEMENT OF THE CASE

The Statutory Scheme

On July 22, 1976, the United States Congress enacted the Local Public Works Capital Development and Investment Act of 1976 (42 U.S.C. §§ 6701, *et seq.*) (hereinafter the Public Works Employment Act of 1976). This Act appropriated $2 billion of

federal monies for which state and local entities could make application in order to alleviate unemployment and improve public works facilities. This Act specifically forbade discrimination:

> "[O]n the grounds of race, religion, color, national origin, or sex . . . under any program or activity funded in whole or in part with funds made available under this subchapter." 42 U.S.C. § 6727(a).

On May 13, 1977, Congress enacted the Public Works Employment Act of 1977 (Pub. L. No. 95-28), amending the 1976 Act. The amendments, among other things, included the provision quoted in full above, which required that at least 10 percent of the dollar value of each project grant be expended with certain minority business enterprises. On May 27, 1977, the Secretary of Commerce issued regulations implementing Public Law No. 95-28. These regulations restated the statutory requirement that no grant would be made under the Act unless at least 10 percent of the grant amount is expended with minority business enterprises. 42 Fed. Reg. 27,434-35 (May 27, 1977).

The federal defendant had until September 30, 1977, to obligate the funds appropriated by Congress under the 1977 Act. (Contractors' Jurisdictional Statement, Appendix A at 15.) In September, 1977, local defendants began announcing bid requests for projects already approved for federal funding, with bid opening to begin in October, 1977.

The Proceedings to Date

On October 5, 1977, Contractors filed their Complaint for Declaratory and Injunctive Relief in the United States District Court for the Central District of California. In their complaint, Contractors sought a declaration that the minority business enterprise requirement of the Public Works Employment Act of 1977 and the actions of federal and local defendants pursuant to this requirement were unconstitutional. They further sought an injunction preventing the federal defendant from mandating that local defendants require bidders to comply with the 10 percent minority business enterprise quota, preventing federal defendant from taking actions penalizing noncompliance with the minority quota and preventing federal defendant from taking any other action in regard to the requirement. An injunction was also sought preventing local defendants from utilizing the minority requirement in their bid specifications for and awards of contracts for projects funded by the Public Works Employment Act of 1977.

On October 6, 1977, Contractors moved for and were granted a temporary restraining order restraining federal defendant from granting any further funds to Los Angeles City and County under the Public Works Employment Act of 1977 for projects which required the 10 percent minority business enterprise allocation and restraining the local defendants from awarding bids for projects funded by the Act which required the minority allocation.

A hearing on Contractors' motion for preliminary injunction was set for October 31, 1977. On October 21, 1977, federal defendant filed a motion for summary judgment. Both motions were heard on October 31, 1977, at which time local defendants and Contractors also moved for summary judgment. The district court then proceeded to hear the case and rule on the merits by consolidating the hearing on preliminary injunction with the hearing on the permanent injunction under Federal Rule of Civil Procedure 65(a)(2).

The district court determined first that Contractors had standing to seek relief and need not exhaust administrative remedies. Second, it ruled on the merits that the statute, regulations, and procedures of all defendant-appellants were unequivocally unconstitutional under the Fifth Amendment to the United States Constitution. (Contractors' Jurisdictional Statement, Appendix B at 38; Appendix A at 15-23.) Third, the court issued an injunction which prevented enforcement of the minority business enterprise requirement for projects funded under the Public Works Employment Act of 1977 only after October 31, 1977, in the case of the Secretary of Commerce and January 1, 1977, in the case of Los Angeles City and County. (Contractors' Jurisdictional Statement, Appendix B at 38-40.)

On December 1, 1977, Los Angeles City and County appealed the district court's determination on standing, exhaustion, and the merits (No. 77-1067). On December 2, 1977, the Secretary of Commerce appealed

the holding on the merits and on the same day Contractors appealed the determination in regard to the injunction (No. 77-1271 and No. 77-1078, respectively). All appeals were made to this Court pursuant to 28 U.S.C. § 1252.

ARGUMENT

I

THE CASE IS NOT MOOT

Federal appellant has argued that the present case appears to be moot and has suggested that the judgment of the district court be vacated and the case remanded for a consideration of mootness. Specifically, federal appellant has suggested mootness in that no further case or controversy exists between the parties since all the contracts funded by federal appellant under the challenged legislation have been let by Los Angeles City and County and their political entities (Federal Jurisdictional Statement at 6-7). This suggestion, however, appears inappropriate in the present instance.

A finding of mootness can be made only after the court has examined all the circumstances to determine whether a substantial controversy exists between the litigants. *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122 (1974). In the present case all the circumstances indicate that such a controversy does exist.

Federal appellant has alleged that the conduct of which appellees complain has ceased in that all the

contracts funded by the challenged legislation have been let. However, cessation of allegedly illegal conduct will not, in itself, render a case moot. When the legality of the defendants' actions has been questioned in a declaratory relief action, the cessation of defendants' conduct involved in the initial action will not necessarily deprive this Court of jurisdiction if something still remains to be determined. *Super Tire*, 416 U.S. at 121-22; *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). If the defendant is free to return to his old ways, "[t]his, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion." *(Id.)*

The burden of showing mootness in this situation is upon the defendant. In *W. T. Grant Co.*, 345 U.S. at 633, this Court indicated:

> "The case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.' [Footnote omitted.] The burden is a heavy one."

The principles stated in *W. T. Grant Co.* were reiterated in *United States v. Concentrated Phosphate Export Association,* 393 U.S. 199, 203 (1968).

> "The test for mootness in cases such as this is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.' [Citation omitted.] A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. But here we have only appellees' own statement that it would be uneconomical for them to engage in any further joint operations. Such a statement, standing alone, cannot suffice to satisfy the heavy burden of persuasion which we have held rests upon those in appellees' shoes."

In the present case, unlike that in *Phosphate Export Association*, we are without even a statement by appellants that they do not intend to continue the practice of allotting federal funds on the basis of race or national origin. Indeed, it is unlikely that federal appellant would make this assertion since as recently as early March, 1978, several subcommittees of the House Public Works and Transportation Committee held general oversight hearings on Public Law No. 95-28. (BNA, *Construction Labor Reporter*, No. 1166 (March 15, 1978), at 1, *et seq.*) During these hearings, the subject of a possible Round III[1] of the Public Works Employment Act was brought up. The indications thus are that the situation presented by the instant case may well recur. Therefore, federal appellant is unable to meet the burden of showing mootness.

Federal appellant asserts "that Congress may in the future authorize similar public works projects with similar minority preferences is not, without more, sufficient to avoid mootness" (Federal Jurisdictional Statement at 8, n.6). This statement, however, ignores

[1]The series of projects funded under the Public Works Employment Act of 1976 has been designated as Round I, the series under the 1977 Act as Round II.

the fact that to assert mootness successfully, *she* must show the situation is unlikely to recur. Neither of the cases cited for the quoted statement support it. Indeed, in *Preiser v. Newkirk*, 422 U.S. 395, 402-03 (1975), this Court detailed the facts of the case and explicitly found that these facts indicated that the case was not one in which it was likely that defendant would be free to return to his old ways. As shown above, this is not the situation in the instant case.

It must also be noted that the prime argument which local appellants make in favor of the Court's jurisdiction contemplates the likelihood of future allocations of federal funds being made under conditions the same as those challenged by Contractors in the district court. (Local Jurisdictional Statement at 8.) Appellants obviously cannot have it both ways. In light of the principles of mootness determined by this Court in *W. T. Grant Co.,* they cannot argue that the case should be dismissed because the challenged activity has ceased, while also arguing that it is vitally important that it be heard because the same activity is likely to occur again.

In a case similar to the present one, certain small businesses challenged the statutory and constitutional authority of the Small Business Administration (SBA) to award a particular contract to socially and economically disadvantaged small businesses, predominately minorities. *Ray Baillie Trash Hauling, Inc. v. Kleppe*, 477 F.2d 696, 701 (5th Cir. 1973). The question of mootness arose when the contract at issue, which had been awarded to a minority business, was

terminated and then awarded to one of the plaintiffs. The court, noting that a case is not moot if there is a reasonable expectation that the act complained of will be repeated, found that the requisite controversy existed and that the case was, therefore, not moot. The basis of this finding was that the SBA intended to continue the socially and economically disadvantaged program, and would apply it to future awards of the contract at issue. Similarly, in the present case there are indications that the minority business enterprise program will be continued. Therefore, it is submitted that the case cannot be found moot on the grounds that no contracts remain to be let under the challenged program.

Lack of mootness is also demonstrated by the fact that the situation herein is one which is capable of repetition, yet evading review. In *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498 (1911), this Court reached the merits of a case based on an order of the Interstate Commerce Commission even though the order had expired. In addressing the issue of mootness, this Court held:

> "The question involved in the orders of the Interstate Commerce Commission are usually continuing . . . and these considerations ought not to be, as they might be, defeated, by short-term orders, capable of repetition, yet evading review, and at one time the government, and at another time the carriers, have their rights determined by the Commission without a chance of redress." *Southern Pacific Terminal*, 219 U.S. at 515.

The *Southern Pacific Terminal* ruling has led to a series of cases which indicate that appellate review of a case will not be foreclosed simply because the situation attacked has ceased to exist, if the underlying dispute between the parties is capable of recurring, but, because of time constraints, is unlikely to reach appeal before the situation has again ceased to exist. (*See Nebraska Press Asso. v. Stuart*, 427 U.S. 539 (1976).)

This is precisely the situation in the present case. As has been argued, repetition of the federally funded minority preference challenged in this case is clearly capable of repetition. It is also unlikely, that in the event of repetition of a federal public works program similar to that challenged herein, that appellate review could be completed before all the federal funds had been allocated and local contracts let. This is amply demonstrated by the facts of the present case. Section 6705(d) of Title 42, United States Code, requires that work on construction of federally funded projects must begin within 90 days of project approval. In the present case, the original complaint was filed on October 5, 1977, five days after the deadline for allocation of federal funds. The district court found that "[a]ny earlier action by plaintiffs would not have defined a concrete controversy, since additional projects might have been approved by the Secretary until September 30." (Contractors' Jurisdictional Statement, Appendix A at 15.) Thus, the time between filing a viable suit, as defined by the district court, and contract letting, which federal appellant

indicates signals the end of an active controversy for purposes of review, is extremely short—90 days at the most. It goes without saying that if this period were used to confine appellate review, such review would be impossible.

In cases which have applied the "capable of repetition, yet evading review" standard to defeat mootness, this Court has applied lenient standards regarding the speculative nature of the likelihood of the recurrence in general and has apparently not required that the individuals affected by the challenged action show that it is bound to affect them in the future. *Nebraska Press Asso. v. Stuart*, 427 U.S. at 546-47; *Moore v. Ogilvie*, 394 U.S. 814 (1969); Note, Mootness on Appeal, 83 Harv. L.R. 1672 (1970).

However, even were this not the case, in the present instance, the situation challenged herein *is* likely to occur. Further, it is also obvious that the effect of a new minority business enterprise requirement will be felt by the present appellees, since as demonstrated by their affidavits filed concurrently with the complaint in the district court, Contractors are individual contractors who have, or associations of contractors whose members have the desire and capability to bid on large public works construction projects.

There is yet a third reason which mitigates against a finding of mootness in the present case. In *Carroll v. Commissioners of Princess Anne*, 393 U.S. 175 (1968), this Court held that a challenge to a ten-day restraining order was not moot in spite of the fact

that the order had long since expired. This Court's reasoning was based upon the finding that the challenged order was "capable of repetition, yet evading review" and also upon finding that the order had continuing effect on the petitioner's activities. *Id.* at 178-80.

In the present case, this continuing effect may similarly be felt. The injunctive relief ordered by the district court did "not govern or apply to Federal funds heretofore granted [before October 31, 1977] or to any actions by Federal Defendants with respect to such funds heretofore granted." (Contractors' Jurisdictional Statement, Appendix B at 39.) Therefore, since all the federal funds allocated under the challenged program had been allotted by October 31, 1977, Contractors are forever prevented from challenging allocations or contracts even if contracts must be rebid due to lack of initial response or unsatisfactory performance.

Further, Contractors disagree with local appellants' assertions that the district court judgment would prevent them from receiving future federal funds under a new public works program. Rather it appears, under the order of the district court, that the Secretary of Commerce would not be prevented from allocating funds to Los Angeles City and County, but only from requiring the utilization of the ten percent minority business quota. However, the fact that local appellants have presented this argument to the Court indicates that they feel there will be continuing consequences of the district court's order. These consequences, if they have been validly assessed, will not only be felt by them, but also by the Contractor appellees, since job possibilities, otherwise available, will be foreclosed.

In summary, therefore, it is submitted that the controversy regarding the minority business enterprise requirement of the Public Works Employment Act of 1977 cannot be found moot by this Court. The appellants here, defendants below, have not shown it is unlikely to occur again, and it is indeed likely to recur. If this recurrence takes place, review will be impossible before all the contracts have been let, as has occurred at present. Finally, the order of the district court will have continued effect on Contractors, and if local appellants are to be believed, on Los Angeles City and County as well. While any one of these possibilities would work against a finding of mootness, a combination of all three would appear conclusive.

II

THE JUDGMENT OF THE DISTRICT COURT IN REGARD TO STANDING, EXHAUSTION, AND THE MERITS SHOULD BE AFFIRMED

A. Standing and Exhaustion

Local appellants' questions regarding exhaustion of administrative remedies and standing present clearly insubstantial issues. The holding of the trial court which did not require exhaustion is undeniably correct. In fact, it is questionable whether Contractors had any remedies to exhaust. While waiver of the

minority business enterprise requirement was a theoretical possibility under the 1977 Act, it was available not to Contractors, but only to Los Angeles City and County as grantees. (Contractors' Jurisdictional Statement, Appendix A at 12-13.) Even if Contractors had access to the waiver procedures, however, exhaustion would not be required under this Court's holding in *Public Utilities Comm'n v. United States,* 355 U.S. 534 (1958), since the administrative proceedings could not dispose of the underlying constitutional challenge posed by Contractors.

In a similar manner, the ruling of the trial court in regard to Contractors' standing is without error. The federal law of standing requires a showing of immediate or threatened injury to individual plaintiffs or members of plaintiff associations from the challenged action. *Warth v. Seldin*, 422 U.S. 490, 511 (1975). The facts presented to the district court amply demonstrated this injury to Contractors in that, among other things, the minority business enterprise requirement excluded certain nonminority plaintiffs from consideration for jobs and required others to bid on jobs on unfamiliar or perceivedly illegal terms or to forego bidding entirely.

It is noteworthy that in a similar case, *Constructors Association of Western Pennsylvania v. Kreps, et al.* (Civil Action No. 77-1035, W.D. Pa. 1977), included as Appendix E in local appellants' Jurisdictional Statement, the district court ruled in favor of a contractor's association on both the standing and exhaustion issues. Inasmuch as the case law, including prior rulings by this Court, conclusively indicates that Contractors herein have both standing and no obligation to exhaust administrative remedies, these issues present insubstantial questions for this Court.

B. The Merits

It is clear that the questions in regard to the correctness of the district court's ruling on the merits of the case are of a more substantial nature than those dealing with exhaustion and standing. However, here too it is apparent that the determination of the district court was correct and it is submitteed that a summary affirmance would be appropriate.

At the onset, in dealing with the constitutional question the district court correctly noted that in utilizing the minority business enterprise requirement, the Public Works Employment Act of 1977 set forth a classification based solely upon race. This Court has held that when faced with a constitutional equal protection challenge, such a classification must be subjected to strict scrutiny. *Loving v. Virginia*, 388 U.S. 1, 11 (1967). In order to pass this scrutiny, it has been further determined that a statute incorporating the classification must meet a compelling state interest and be drawn with precision and tailored to serve its legitimate objectives. If there are other reasonable ways to achieve its goals with a lesser burden on constitutionally protected activity, the government may not choose the way of greater interference. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

The district court correctly determined that a minority preference, such as the one included in the Public Works Employment Act of 1977, cannot meet the compelling state interest standard. No holding by this Court contradicts this reasoning. It is clear from the limited legislative history available dealing with Section 103(f) of the Public Works Employment Act (123 Cong. Rec. H1436-41; S3910) that the quota was imposed without evidence of a clear-cut pattern of discrimination. (*See Kirkland v. New York St. Dept. of Correctional Serv.*, 520 F.2d 420 (2d Cir. 1975).) The quota was designed primarily to give minority businesses a preference in order to ensure them an arbitrary "fair share" of a federal program. Such an objective, grounded in racial or national preference, cannot rise to the status of a compelling state interest. *De Funis v. Odegaard*, 416 U.S. 312, 341-44 (1974) (Douglas, J., dissenting).

Nor, as found by the district court, can the minority requirement meet the other criteria of the strict scrutiny test. Under these criteria, the government must show that no other means exists to achieve its objective, assuming this is to be considered legitimate, which would be less constitutionally burdensome on those affected. *Dunn v. Blumstein, supra.* Clearly an enactment which totally excludes non-minority businesses from competing for $400 million (10 percent of the $4 billion allotted by the Public Works Employment Act of 1977) of federal funds is extremely burdensome. However, again, the limited legislative history of Section 103(f) shows that

no other means of aiding minority enterprises was even considered.

Finally, the imposition of an arbitrary 10 percent nationwide minority preference is hardly drawn with precision. Nor can it be said to be tailored to meet its objectives. While the quota might give some minority businesses a "fair share" of federal funds, there is no attempt to ensure that these funds would go to alleviating employment distress in the minority community, nor to building up fledgling minority enterprises. Thus, it is apparent that the district court correctly determined that the minority business enterprise requirement of the Public Works Employment Act of 1977 was constitutionally invalid. This determination should be summarily affirmed.

Contractors have asserted that the holding of the district court on the issues of standing, exhaustion, and the invalidity of Section 103(f) of the Public Works Employment Act should be affirmed. However, Contractors are aware of the numerous cases dealing with the unconstitutionality of the minority preference in which varying determinations have been reached. (Federal Jurisdictional Statement at 4, n.6.) Contractors are also aware that these varying determinations will engender confusion and controversy and be the subject of numerous further judicial proceedings. In view of these facts and the high likelihood that future preference programs similar to that in the Public Works Employment Act of 1977 will be enacted, this Court may wish to note probable jurisdiction and set this case for argument.

CONCLUSION

For the reasons stated above, the judgment of the district court should be summarily affirmed. In the alternative, probable jurisdiction should be noted.

Respectfully submitted,

RONALD A. ZUMBRUN,
JOHN H. FINDLEY,
Pacific Legal Foundation,
455 Capitol Mall, Suite 465,
Sacramento, California 95814,
Telephone: (916) 444-0154,
Attorneys for Appellees and Cross-Appellants.

Of Counsel:
SANDRA R. JOHNSON,
Pacific Legal Foundation,
455 Capitol Mall, Suite 465,
Sacramento, California 95814,
Telephone: (916) 444-0154,
LAWRENCE H. KAY,
301 Capitol Mall,
Sacramento, California 95814,
Telephone: (916) 444-6430.

April, 1978.